Francis Phillips a/l AJ Phillips v Bank Industri Malaysia Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–576 OF 1998

ABDUL HAMID MOHAMAD, ARIFIN ZAKARIA AND MOHD GHAZALI JJCA

26 JANUARY 2004

Civil Procedure — Trial — Conduct of proceedings — Close of respondent's case — Submission of no case to answer by appellant — Whether submission of no case could be sustained

Contract —Guarantee — Gurantor's liability — Statement of account — Whether prima facie evidence of indebtedness — No evidence adduced to show a manifest error

Contract — Guarantee — Validity — Financial facilities extended — Fact that financial facilities disbursed not challenged by appellant — Whether respondent must prove monies disbursed for a particular purpose

By an agreement entitled 'Line of Import Trading Agreement', the Islamic Development Bank of Jeddah, Saudi Arabia ('the IDB') agreed to extend to the respondent a 'Line of Import Trade Financing'. The first defendant applied to the IDB through the respondent to assist the first defendant in financing 'the import of a quantity of goods'. On 22 September 1988, the respondent, the IDB and the 1st defendant entered into an agreement entitled 'Import Trade Financing Agreement' for the said purpose ('the ITF agreement'). This was the first facility. The second facility involved a loan to part finance the purchase of machinery and other fixed assets for the production of printed circuit boards. The appellant together with the third, fourth and fifth defendants stood guarantee for both facilities. The first defendant defaulted and was sued. The respondent had already obtained summary judgments for the sum of RM411,704.74 against the first, third and fourth defendants and these judgments have not been set aside. Summary judgment was also entered against the appellant but this application was set aside. By the time the suit against the appellant was heard and disposed off, the said judgment sum of RM411,704.74, had risen to RM578,716.64 based on the statement of accounts. The trial judge gave judgment for the respondent and the appellant appealed. The counsel for the respondent argued that the respondent must prove that the moneys were disbursed for the purpose of purchase of machinery and raw materials for the manufacture of printed circuit boards, which were the subject matter of the guarantees given by the appellant and the debentures issued by the first defendant. The appellant submitted that there was no case to answer at the close of the respondent's case.

Held, dismissing the appeal:

(1) The appellant did not challenge or question the correctness of the statement of account. The document was prima facie evidence of the

indebtedness of the appellant and that since no evidence at all had been adduced to vitiate the exhibit, by manifest error or otherwise, it was conclusive of the appellant's liability for the amount stated therein (see para 15).

(2) The evidence was clear that the moneys were disbursed to the first defendant. As to how the moneys were applied by the first defendant, viz., whether the raw materials or machinery purchased were utilized to 'produce' or to 'manufacture' or to 'assemble' circuit boards could not have any bearing upon the respondent's claim. The appellant had admitted that he executed the guarantees. He had not in his pleadings questioned the validity of the guarantees that he executed and had not stated that the two facilities extended to the first defendant were invalidated because the moneys were utilized not for the 'production' of printed circuit boards but for 'assembling' printed circuit boards (see para 21).

(3) The evidence adduced by the respondent had established a case in law for the appellant to answer. The appellant had chosen to close the case at the end of the respondent's case. The appellant had failed to show that the evidence of the respondent in support of their claim against him was so unsatisfactory or unreliable that the burden of proof on the respondent of relevant issues had not been discharged (see paras 24–25).

[Bahasa Malaysia summary

Melalui satu perjanjian bertajuk 'Line of Import Trading Agreement', Bank Pembangunan Islam Jeddah, Arab Saudi ('BPI') telah bersetuju untuk memberikan kepada responden satu 'Line of Import Trade Financing'. Defendan pertama telah memohon kepada BPI melalui responden untuk membantu defendan pertama dalam pembiayaan 'the import of a quantity of goods'. Pada 22 September 1988, responden, BPI dan denfenda pertama telah memasuki satu perjanjian bertajuk 'Import Trade Financing Agreement' bagi tujuan tersebut ('perjanjian ITF tersebut'). Ini merupakan kemudahan pertama. Kemudahan kedua melibatkan pinjaman untuk membiayai sebahagian pembelian mesin dan aset-aset tetap lain untuk penghasilan papan-papan litar bercetak. Perayu bersama defendan-defendan ketiga, keempat dan kelima telah menjadi penjamin untuk kedua-dua kemudahan. Defendan pertama telah melakukan kegagalan dan disaman. Responden telahpun memperolehi penghakiman terus bagi jumlah RM411,704.74 terhadap defendan-defendan pertama, ketiga dan keempat dan penghakiman-penghakiman tersebut tidak diketepikan. Penghakiman terus juga telah dimasuki terhadap perayu tetapi permohonan berhubung beliau telah diketepikan. Apabila guaman terhadap perayu telah didengar dan diselesaikan, jumlah penghakiman RM411,704.74, telah bertambah kepada RM578,716.64 berdasarkan penyata akaun. Hakim bicara telah memberikan penghakiman menyebelahi responden dan perayu telah merayu. Peguam bagi pihak responden harus membuktikan bahawa wang tersebut telah dibayar bagi tujuan pembelian

mesin dan bahan mentah untuk pembuatan papan-papan litar bercetak, yang merupakan perkara pokok jaminan-jaminan yang diberikan oleh perayu dan debentur-debentur yang dikeluarkan oleh defendan pertama. Perayu telah memilih untuk berhujah bahawa tidak terdapat kes untuk dijawab di penutup kes responden.

Diputuskan, menolak rayuan tersebut:

(1) Perayu tidak mencabar atau menyoal ketepatan penyata akaun tersebut. Dokumen tersebut adalah keterangan prima facie keberhutangan perayu dan memandangkan tiada keterangan langsung telah dikemukakan untuk mengesahkan ekshibit tersebut, melalui kesilapan atau sebaliknya, ia adalah konklusif liabiliti perayu bagi jumlah yang dinyatakan (lihat perenggan 15).

(2) Keterangan adalah jelas bahawa wang tersebut telah dibayar kepada defendan pertama. Berhubung bagaimana wang tersebut diperolehi oleh defendan pertama, melalui, sama ada bahan mentah atau mesin yang dibeli digunakan untuk 'menghasil' atau untuk 'membuat' atau untuk 'memasang' papan litar tidak mempunyai apa-apa kaitan dengan tuntutan responden. Perayu telah mengakui bahawa beliau telah menyempurnakan jaminan-jaminan tersebut. Beliau tidak menyoalkan kesahihan jaminan-jaminan tersebut dalam pliding beliau dan tidak menyatakan bahawa kedua-dua kemudahan yang diberikan kepada defendan pertama tidak sah kerana wang tersebut telah digunakan bukan untuk 'penghasilan' papan-papan litan yang bercetak tetapi untuk 'pemasangan' papan-papan litan bercetak tersebut (lihat perenggan 21).

(3) Keterangan yang dikemukakan oleh responden telah membuktikan satu kes undang-undang yang memerlukan jawapan perayu. Perayu telah memilih untuk menutup kes tersebut di akhir kes responden. Perayu telah gagal untuk menunjukkan bahawa keterangan responden yang menyokong tuntutan mereka terhadap beliau adalah tidak memuaskan atau tidak boleh digunakan sehingga beban bukti ke atas responden berhubung persoalan-persoalan relevan tidak diselesaikan (lihat perenggan-perenggan 24–25).]

Notes

For cases on conduct of proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6400–6407.

For cases on validity of gurantees, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3569–3575.

For cases on gurantor's liability, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3462–3489.

For the trial process, see 1 *Haslbury's Laws of Malaysia* paras [10.8–001]–[10.8–035].

For guarantees, see 16 *Halsbury's Laws of Malaysia* paras [270.003]–[270.062].

Cases referred to

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989
Companies Act 1965 ss 4, 132(1)
Evidence Act 1950 s 101
Moneylenders Ordinance 1951

Appeal from: Suit No D5–22–1375 of 1990 (High Court, Kuala Lumpur)

James Selva (Ong Kok Bin & Co) for the appellant.
Terrance Marbeck (Aznim Azhar with him) (Tengku Mohamed & Alan Lim) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] The respondent, a locally incorporated company and the plaintiff in the court below, was formerly named as Bank Kemajuan Perusahaan Malaysia Bhd. It was incorporated on 7 August 1979. On 14 November 1988, it changed its name to Bank Industri Malaysia Berhad.

[2] The appellant, the second defendant in the court below, is a director of Technopro Corporation (M) Bhd, the first defendant in the court below. Besides the appellant, three other directors of the first defendant were also parties to the action in the court below, viz, the third, fourth and fifth defendants.

[3] In 1988, two financial facilities were granted by the respondent to the first defendant. The appellant together with the third, fourth and fifth defendants stood guarantee for both facilities. The first defendant defaulted and was sued. Simultaneously, the appellant and the third, fourth and fifth defendants were sued on the guarantees they executed.

[4] The respondent had already obtained summary judgments for the sum of RM411,704.74 against the first, third and fourth defendants and these judgments have not been set aside. Summary judgment was also entered against the appellant but on his application was set aside.

The background

[5] By an agreement entitled 'Line of Import Trading Agreement' dated 26 August 1988, the Islamic Development Bank of Jeddah, Saudi Arabia ('the IDB') agreed to extend to the respondent 'a Line of Import Trade Financing' in an amount which shall not exceed US$10 million 'to be utilized in the manner and according to the terms and conditions set forth in this Agreement'. Under the agreement, the respondent agreed to 'evaluate applications by Malaysian Beneficiaries for financing the purchase of Goods, to select qualified applicants on the basis of acceptability of commercial/financial risks involved and to submit the applications selected

for approval by IDB and has agreed to act for and on behalf of IDB and as its Agent with respect to all matters, things and actions arising out this Agreement including but without limiting the generality of the foregoing to enter into and execute the Import Trade Financing Agreements ... with the various Malaysian beneficiaries for and on behalf of IDB'. It is provided therein that 'beneficiary' shall mean 'an institution in Malaysia which applies for Import Trade Financing under the Line'.

The first facility

[6] Sometime in 1988, the first defendant applied to the IDB through the respondent to assist the first defendant in financing 'the import of a quantity of goods'. The IDB had on the basis of the proposals and recommendations made by the respondent approved an amount not exceeeding US$100,000 ('the ITF amount'). On 22 September 1988, the respondent, the IDB and the first defendant entered into an agreement entitled 'Import Trade Financing Agreement' for the said purpose ('the ITF agreement').

[7] By an agreement entitled 'Guarantee Facility Agreement' ('the GF agreement') made between the first defendant and the respondent and also dated 22 September 1988, the respondent agreed to guarantee the liability of the first defendant to the IDB for the ITF amount upon the terms and conditions set out therein. The first defendant agreed therein to execute in favour of the respondent as security for the repayment of the guarantee facility, the fees and interest thereon the following:

(i) a first floating charge by way of deed of debenture over all their floating assets of the first defendant now or hereafter acquired; and

(ii) joint and several guarantees of its directors, viz, the appellant and the third, fourth and fifth defendants.

[8] By a debenture issued by the first defendant, dated 22 September 1988, the first defendant agreed to charge all its floating assets subject to the terms and conditions as contained therein. The first defendant covenanted that it will on demand pay to the respondent the guarantee fees and discharge all obligations and liabilities due and owing or incurred to the respondent under the GF agreement. By a written guarantee dated 16 December 1988 ('the ITF guarantee') the appellant and the third, fourth and fifth defendants jointly and severally guaranteed as principal debtors the repayment by the first defendant of the ITF amount together with interest, costs, charges and all other sums payable by the first defendant to the respondent under the ITF agreement.

The second facility

[9] Pursuant to a debenture issued by the first defendant, dated 21 October 1988, the respondent at the request of the first defendant,

granted a loan facility of RM200,000 to the first respondent ('the loan') to part finance the purchase of machinery and other fixed assets for the production of printed circuit boards. By a guarantee agreement dated 7 December 1988 ('the loan guarantee'), the appellant and the third, fourth and fifth defendants jointly and severally guaranteed as principal debtors the repayment by the first defendant of the loan together with interest, costs and charges and all other sums payable by the first defendant to the respondent.

The suit

[10] The first defendant defaulted in the payment of the ITF amount and the loan and hence by letter dated 13 June 1990, the respondent's solicitors demanded the repayment of all monies due and owing to the respondent from the appellant and the other defendants. By writ of summons, which was amended on 14 May 1996, the respondent claimed from the appellant and the other defendants the sum of RM411,04.74 which was the amount due and owing as at 17 April 1990.

[11] Clause 7.5 of the ITF guarantee and the loan guarantee, upon which the respondent's claim against the appellant are based upon, are identical and reads:

> A statement of accounts in writing showing the indebtedness of the Borrower to the Bank certified by its General Manager, Manager, Accountant or any other Officer shall be binding and conclusive against the Guarantors their respective heirs, executors administrators, representatives and assigns.

[12] By the time the suit against the appellant was heard and disposed off, the said judgment sum of RM411,704.74 as obtained against the first, third and fourth defendants had risen to RM578,716.64 pursuant to exh P1, which is the statement of accounts issued within the contemplation of the said cl 7.5 referred to above. At the end of the day, the learned Judge gave judgment for the respondent and ordered that the appellant pay to the respondent the sum of RM578,716.64 with interest at 8%pa from the date of judgment until the date of realization and costs. The appellant appealed.

[13] Before us, the appellant's counsel canvassed the following arguments:

(a) The learned judge failed to hold that the monies disbursed under the two facilities were for the 'assembly of printed circuit boards'. Counsel argued the respondent must prove that the monies were disbursed for the purpose of purchase of machinery and raw materials for the manufacture of printed circuit boards. To support his contention he referred to s 101 of the Evidence Act 1950 which reads:

> (1) Whosoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
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> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

(b) The learned judge failed to hold that the respondent did not disburse the monies for the manufacture of printed circuit boards which were the subject matter of the guarantees given by the appellant and the debentures issued by the first defendant.

[14] Besides the above, the appellant's counsel pointed out that at the trial, the appellant opted to submit that there was no case to answer at the close of the respondent's case.

[15] In relation to the said sum of RM578,716.64 claimed by respondent against the appellant as reflected in exh P1, we noted that the appellant did not challenge or question the correctness of that document. We would agree with the contention of the respondent's counsel that exh P1 is prima facie evidence of the indebtedness of the appellant and that since no evidence at all had been adduced to vitiate exh P1, by manifest error or otherwise, it is conclusive of the appellant's liability for the amount stated therein. In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, in dealing with a similar document, viz, a certificate of indebtedness, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said (at p 284):

> In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus 'A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives.' It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate: see *Dobbs v National Bank of Australia Ltd* (1935) 53 CLR 643; *Bache & Co v Banque Vernes* [1973] 2 LLLR 437.

[16] We also noted that the appellant is not challenging that the monies under the two facilities were disbursed to the first defendant. What the appellant is making an issue of, before us, is that the respondent must prove that the monies were disbursed for the purpose of purchase of machinery and raw materials for the manufacture of printed circuit boards. We are surprised that the appeal had been pursued along these lines. Documentary evidence adduced at the trial showed the following:

(i) at its board meeting held on 1 July 1988, the first defendant resolved 'that the Company do hereby obtain and accept from Bank Kemajuan Perusahaan Malaysia Berhad a Guarantee Facility to secure the Islamic Development Bank Import Trade Financing Operation of US$100,000 for the importation of raw materials'; it was also resolved at that meeting that 'the said facility be secured by a first charge over the floating assets purchased under the ITFO facility and that it also be jointly and severally guaranteed by all the directors of the Company' and 'that authority be and is hereby given for the Common Seal of the Company to be affixed under the hands of the two Directors, Mr Francis Phillips and Encik Jamaludin bin Rahmat, onto all relevant documents as required to be executed in connection therewith';

(ii) the preamble to the ITF agreement states that the first defendant had applied to IDB through the respondent to assist them in 'financing the import of a quantity of goods';

(iii) the recital to the debenture dated 22 September 1988, issued by the first defendant pursuant to the ITF agreement, stated that the first defendant had applied to the respondent and that the respondent had granted the facility to assist the first defendant 'in the importation of raw materials for the manufacture of printed circuit board';

(iv) clause 3 of the debenture dated 21 October 1988, issued by the first defendant pursuant to the loan, stated that the purpose of the facility was to part finance the first defendant 'in the purchase of machinery and other fixed assets for the production of printed circuit board'.

[17] We noted that the learned judge had dealt with this issue. In his grounds of decision (at pp 32–34 of the appeal records), in dealing with the evidence of PW2, an officer of the respondent, the learned judge said:

> PW2, Azijan bin Sipon, has explained the nature of the transactions, identified the second defendant's signature on the letters of guarantees and undertaking and has clearly stated that the second defendant did not object to executing them. He also testified that the second defendant was in charge of the first defendant's business and its operations and that the plaintiff did not receive any correspondence from the first defendant in regard to the conditions precedent.

[18] In dealing with the evidence of PW3, a director of the first defendant, the learned judge said:

> PW3, Jamaludin bin Rahmat, a director and the largest shareholder of the first defendant had testified that he was aware of the financial facilities extended to the first defendant by the plaintiff, that the term loan of RM200,000 was disbursed, that the first defendant did draw upon the import trade financing facility of up to US$100,000 and that no repayments had been made. He also said that the second defendant who was in charge of the marketing entity for the first defendant's products took these products for sale without paying a single cent for them and that the first defendant's working capital came from the plaintiff's financial facilities and from him.

[19] PW3 also stated that the appellant was the chairman of the first defendant.

[20] The learned judge then went on to say as follows:

> One final issue I have to consider. The second defendant made much of the fact that the first defendant was in fact *assembling* printed circuit boards and that the loans obtained were not for the *manufacture* of the printed circuit boards as contended by the plaintiff.
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> Whether the loans were to be utilized for the *manufacture* or for the *assembling* of the printed circuit boards, the fact remains that the said two facilities were indeed granted to the first defendant and guaranteed by the second defendant. The purpose for which the loans were to be used has become more of an issue, when it ought

not to be so. In fact, the plaintiff's letter of offer of the term loan of RM200,000 to the first defendant dated 12 May 1988 states the purpose of the said loan as being 'To part finance the purchase of machinery and other fixed assets for the *production* of printed circuit board'. The word production can mean both assembling products and manufacturing products. Since manufacturing requires the obtaining of a licence and since no licence has in fact been obtained, the word production in the letter of offer must mean assembling and not manufacturing. If there was any other meaning to be attributed surely the second defendant could have given evidence to that effect.

[21] We cannot fathom the arguments canvassed by the appellant. How the first defendant applied or utilized the monies disbursed under the two facilities is their business. The first defendant applied for the line of financing under the ITF agreement to assist them in financing 'the import of a quantity of goods'. The first defendant's board resolution described it as a financing facility to assist the company 'in the importation of raw materials for the manufacture of printed circuit board'. In relation to the loan, the debenture issued stated that the purpose of the facility was to part finance the company 'in the purchase of machinery and other fixed assets for the production of printed circuit boards'. From the evidence, it is clear that the monies were disbursed to the first defendant. As to how the monies were applied by the first defendant, viz, whether the raw materials or machinery purchased were utilized to 'produce' or to 'manufacture' or to 'assemble' circuit boards surely cannot have any bearing upon the respondent's claim. The first defendant borrowed the monies to pay for the import of goods and to part finance the purchase of machinery and other assets for the production of printed circuit boards. As to whether the first defendant was 'producing' or 'manufacturing' or 'assembling' the circuit boards has no bearing on the claim against the appellant. The appellant, a director and shareholder of the first defendant, cannot seek to avoid his liability as guarantor by relying on these arguments. His obligations are co-extensive with that of the first defendant against whom a valid judgment exists. He is accordingly legally liable for the amount pursuant to the judgment entered against him. He had admitted that he executed the guarantees. He has not in his pleadings questioned the validity of the guarantees that he executed and has not stated that the two facilities extended to the first defendant are invalidated because the monies were utilized not for the 'production' of printed circuit boards but for 'assembling' printed circuit boards. The first defendant is an artificial person. As one of the directors of the first defendant and its chairman at that, and as an 'officer' of the company as defined under s 4 of the Companies Act 1965, the appellant is required under s 132(1) of the same to 'act honestly and use reasonable diligence in the discharge of his duties of his office'. He cannot now seek to avoid his liability as guarantor by raising issues which were never pleaded. The monies were disbursed and the appellant as guarantor is legally liable to pay the amount claimed.

[22] We also do not see the relevance of the appellant's counsel reminding us that the appellant opted to submit 'No case to answer' after the respondent

had called witnesses and closed its case. In his grounds of decision, the learned judge said (at pp 28–29 of the appeal records):

> After the plaintiff had called witnesses and closed it case the second defendant opted to submit that he had no case to answer after I had put to him to his election.

[23] On this issue, *Halsbury's Laws of England* (4th Ed) Vol 37 at p 396, which was referred to by the respondent's counsel, read as follows:

> **516 Submission of no case.** The defendant may make a submission that there is no case to answer after the plaintiff's case has been closed. Such a submission may be made either where the evidence adduced by the plaintiff does not establish any case in law for the defendant to answer, or where the evidence is so unsatisfactory or unreliable that the court should rule that the burden of proof on the plaintiff has not been discharged. The judge has a discretion to rule upon such a submission without putting counsel for the defendant to his election whether he will or will not call evidence. If the submission fails and counsel for the defendant does not announce his intention to adduce evidence, counsel for the plaintiff may address the judge or jury a second time for the purpose of summing up the evidence, but he may not do this if the judge holds that there is no case to answer or to go to the jury.

[24] We are more than satisfied that the evidence adduced by the respondent had established a case in law for the appellant to answer. The burden of proof on the respondent had been discharged. The appellant had chosen to close the case at the end of the respondent's case. Before us, he contended that the respondent must prove that the monies were disbursed for the purpose of purchase of machinery and raw materials for the 'manufacture' of printed circuit boards when such a stand was never pleaded nor even raised in the court below. In the court below, he took the issue that the loans granted under the two facilities were illegal and that the respondent as an unlicenced moneylender and as an unlicensed entity under the Banking and Financial Institutions Act 1989 was precluded from recovering any money lent. The learned judge found the appellant's submission on illegality to be 'totally devoid of merit'. Before us, the issue of illegality was not raised. We took it that the appellant has abandoned this ground which, from our reading, was the main ground appearing in his memorandum of appeal. Be that as it may, we have noted that no facts have emerged in evidence in the course of the trial showing that the loans granted under the two facilities were illegal. The appellant himself acknowledged in his amended statement of defence and counterclaim that the respondent is exempted from the Moneylender's Ordinance 1951 at the material time when the facilities were made available to the first defendant. Further, documentary evidence adduced by the respondent and not disputed by the appellant proved that the respondent is exempted from the provisions of the Moneylenders Ordinance 1951 and that the provision of the facilities to the first defendant as guaranteed by the appellant took place prior to the enactment of the Banking and Financial Institutions Act 1989.

[25] We are of the view that the learned judge had rightfully granted judgment to the respondent. The appellant has failed to show that the evidence

of the respondent in support of their claim against him is so unsatisfactory or unreliable that the burden of proof on the respondent of relevant issues has not been discharged.

[26] The appeal is hereby dismissed with costs. We would also order the deposit to the respondent on account of taxed costs.

Appeal dismissed.

Reported by Sally Kee Seok Meng